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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WALTER M. HENRITZE, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Walter M. Henritze, Jr., defendant below, respectfully prays that a Writ of Certriorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 21, 1975.

OPINIONS BELOW

The opinion of the court of appeals (App. A., *infra*) and the order denying the motion for rehearing or rehearing en banc (App. B., *infra*) are unpublished.

JURISDICTION

The mandate on the judgment was stayed on December 8, 1975, appellant being given until December 28,

1975, to file this writ and notify the Fifth Circuit Court of Appeals (App. C., *infra*). The jurisdiction of the Court is invoked under 28, U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, venue, under 21 U.S.C. 952(a) (importation of marijuana) becomes fixed at the port-of-entry and discovery?

2. Whether a search warrant may describe two premises and either may be searched under the warrant.

3. Whether Federal Agents may disregard the strictures of 18 U.S.C. 3109 (announcement of a Federal Officer's presence) partially or completely when executing a search warrant.

4. Whether defendant's sub-leased office and desk could be searched without a search warrant.

5. Whether there are any standards of any nature which are used in the search and seizure of packages coming into the United States by mail.

6. Whether there was sufficient evidence to sustain defendant's conviction under 18 U.S.C. 371 (conspiracy) and 21 U.S.C. 952(a) (importation).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment VI, provides in pertinent part:

In all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury of the state and district wherein the crime shall have been committed. . . .

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 3109 provides:

Breaking doors or windows for entry or exit.—The officer may break open any outer or inner door or window of a house, or any part of a house or anything wherein to execute and search warrant, if after notice of his authority and purpose he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

21 U.S.C. 952(a) provides:

It shall be unlawful to import into the customs territory of the U.S. from any place outside thereof (but within the U.S.) from any place outside thereof, any controlled substance in schedule I or II of title II, etc.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of importing a pound of marijuana in violation of 21 U.S.C. 952(a) and of conspiring to commit that offense in violation of 18 U.S.C. 371. The court directed a verdict of not guilty as to a third count under 21 U.S.C. 841(a)(1) (possession with intent to distribute a controlled substance). Petitioner was sentenced to imprisonment for two years on each count with two years of special parole to follow, both sentences to run concurrently. On appeal the court affirmed per curiam (App. A) and denied a motion for rehearing and rehearing en banc (App. 3).

The court stayed the mandate for thirty days pending the filing of a Petition for a Writ of Certiorari in this Court (App. C). This Petition seeks review of the affirmance of both convictions.

1. The prosecution arose from the following:

On August 8, 1974, Charles Cuccaro, a mail specialist working for the customs in New York, opened a package addressed to June Llewellyn, 2311 Bank of Georgia Building, Atlanta, Georgia. All packages from some 20 countries whether first class or not were opened with the exception of APO packages.

He estimated that 99% of all packages coming into the United States were in fact opened and examined.

Cuccaro, field tested the contents for marijuana and the test was positive. He wrote a seizure report, initialed the package, turned the package over to a Drug Enforcement Administration Officer, who logged it, resealed the package and sent it on to Atlanta, via first class regular mail. He, personally, never communicated to anyone in Atlanta, though he did include in the mailing a report on his findings.

Arthur Snitzer, a postal inspector, received the package on August 20, 1974, in a locked mail bag, with information that the package contained a controlled substance.

He informed agent James Williams, of the Drug Enforcement Administration of the arrival on the same day, the package remained sealed until the day before delivery, that is the 12th of September, 1974. Mr. Snitzer had custody of the package until that day, since the responsibility of the delivery rested with the case agent for the DEA.

On September 12th, the package was opened without a warrant and tested by Mr. Williams of the DEA in the presence of United States Postal Inspector Snitzer, Special Agent Robert Alston, U.S. Customs, Special Agent James Williams, DEA, Special Agent George Faz, DEA, and Special Agent Mike Dorsett, DEA.

Agent Williams then applied for a search warrant before the Honorable Allen Chancey, United States Magistrate for the Northern District of Georgia on the same day. The warrant was issued the same day by Judge Chancey and the package was resealed.

BLEED THROUGH

The delay in delivering the package was accounted for by Agent Williams because the agency lacked manpower and had a heavy work schedule.

On the following day, September 12, 1974, DEA Agents Dorsett and Faz entered the premises at 2311 Bank of Georgia Building, between 9:50 and 10:00 o'clock. They did not have an arrest or search warrant on them. Nor did they identify themselves as Law Enforcement Officers. At the time he (Dorsett) entered, Mrs. Llewellyn was sitting at her desk in the reception area. The defendant was not visible and did not come out of his office (which he subleases from the firm of Gower, Noland and McGuigan) until after the package was delivered.

Agent Faz, had told the secretary that he was in trouble and waiting for a lawyer.

Ezekiel McConnell, a letter carrier for the United States Postal Service, was given the package on September 13, 1974, by Inspector Snitzer. He delivered the package at 2311 Bank of Georgia Building and the secretary signed for the package. Mr. Snitzer told Mr. McConnell to get the registered mail receipt signed by the secretary. The package was delivered in the normal way.

Shortly after delivery defendant came out of his office and talked to Agents Dorsett, Faz and the secretary.

The package, which had been sitting on the secretary's desk for some 10 or 15 minutes, was shown to the defendant by the secretary. The defendant glanced at the package and returned the item to the secretary. Nothing was said between the defendant and the secretary. Henritze then returned to his office. A few

moments later he came back into the reception area and told the secretary he was going to the United States Federal District Court. He then left. The package was still on the secretary's desk where she had put it.

Ten to fifteen minutes after Henritze had left, the secretary picked up the package and placed it in what was later found to be the defendant's office. There it was seized by Agent Williams when he entered with the search warrant. No arrest warrant had been issued or executed in the case. The secretary was, however, arrested at that time.

In the interim, the defendant had proceeded down stairs to the lobby of the Bank of Georgia building. He had been followed down stairs by Agent Williams. Defendant was searched after being apprised of the fact that a search warrant was existent. Nothing being found on him, he left to go to the Federal District Court.

Defendant filed a Motion to Suppress and a Motion for a Bill of Particulars, both were heard on the day of the trial. The Bill of Particulars was overruled, subject to certain information being given to the defendant.

The Motion to Suppress was also overruled although the trial judge thought the point was substantial.

At the trial the Government's case implicating the defendant rested primarily on four witnesses.

The first, Ann Hester, a former secretary, testified that she and Joyce Weldy had lunch with the defendant, on August 5, 1974 at Crowley's, in Underground

Atlanta, where defendant, in the middle of a general conversation, said he was expecting some hash from Amsterdam. She also testified that she had never received any package from overseas while working for the defendant for a period of five or six years. She also testified that in the entire time they had known each other, this was the only instance where the defendant had ever mentioned this particular subject. No mention was made where he was to receive the hash and Mrs. Hester never mentioned it to the authorities until after the delivery of the package.

Mrs. Weldy testified also to the conversation at the restaurant. She testified that the defendant said he was getting a shipment of "hash" in the next week. She also testified that she had had lunch with the defendant only once in her life.

Theresa Moore testified that the defendant came to her office and told her he had a pound of hash coming. She couldn't remember the date when this happened, and she did not report this conversation to the authorities until after the package was delivered. No one else was present at this conversation and she never mentioned the matter again until the package arrived.

June Llewellyn testified that she worked for the firm of Gower, Noland and McGuigan at 2311 Bank of Georgia Building and that defendant rented space from the firm.

She testified that a package was delivered to her at that address and she signed for it. The package had a return address from Holland. Mrs. Llewellyn knew no one from there. She said that six or eight weeks after defendant had rented space he told her that if she received a package addressed to her she should

put it on his desk. No mention was made of a foreign package.

A package arrived in late May or early June and the secretary put it on his desk.

On cross-examination she stated she had neither asked the defendant about the contents of the package nor had she told anyone of its arrival. The defendant never told the secretary he was expecting another package.

No communications overseas were known to the secretary. The defendant did not tell the secretary to place the package on his desk.

She also testified that the defendant's comings and goings were erratic with no set time when she could predict when he would be in the office.

The Government also put up a forensic chemist who testified that the substance was hashish, a marijuana derivative.

Defendant took the stand and denied making any such statements and denied any involvement in the importation of any drugs.

A witness, Mrs. Kay Dallinger, testified that on the date mentioned by Hester and Weldy she was at Crowly's with the defendant and the following day she was there with a friend and neither Hester nor Weldy was present. Nor was the defendant.

REASONS FOR GRANTING THE WRIT

Since only a per curiam opinion was written in this case it has been necessary to set out the above testimony rather more fully than usual.

1. While this Court has passed on the question of venue vis-a-vis 18 U.S.C. 371 (conspiracy) *Hyde* v. *U.S.*, 225 U.S. 347 (Four Judges dissenting) (Justices Holmes, Hughes, Lurton and Lamar), and *Brown* v. *Elliott,* 225 U.S. 392 (same dissenters), it has never rendered a decision on this new substantive importation statute 21 U.S.C. 952(a).

The venue of smuggling prosecutions was settled by this Court some three quarters of a century ago, in *Keck* v. *U.S.,* 170 U.S. 434 (1899). The entire court in *Keck* agreed that the offense of smuggling or clandestinely introducing into the United States was undoubtedly completed when the goods arrived at the port-of-entry, which in the present case was New York, N. Y. Petitioner does not deny that an indictment could have been returned charging him with "facilitating the transportation or concealment of marijuana after being imported or brought into the United States, knowing the same to have been imported or brought in contrary to law." The naked fact is that he was not so charged.

The venue question as to importation has already caused a split amongst the Circuits. The Fourth (*U.S.* v. *Lember,* 319 F. Supp. 356), and the Ninth (*U.S.* v. *Feldman,* 366 F. Supp. 346), follow the *Keck* rule, i.e. venue at the port-of-entry: The Tenth does not (*U.S.* v. *Jackson,* 482 F.2 1167).

The conflict should be settled by this Court for a number of reasons. Prior to 1965 the reports are virtually silent regarding illegal importation by mail. Since then they have appeared numerous times in all circuits. A large group is set out in *U.S.* v. *Feldman,* 366 F. Supp. 356.

A settlement of this issue will not only protect defendants but help law enforcement.

The Constitutional right under the Sixth Amendment to have a case tried in the state and district wherein it was committed is sure to be raised again and again. The particular District Attorney should have a decision from this Court eliminating doubt and obviating the necessity of retrials.

Because of the concurrent sentence doctrine the venue question must also be argued as to the conspiracy convictions.

Petitioner has set out the testimony in this case at some length primarily for this reason.

Hyde v. *U.S.*, 225 U.S. 247, stands for the proposition that venue under the general conspiracy statute may be had in any district where an overt act occurred or where the agreement was made.

If the Court accepts Petitioner's reliance on *Keck, supra,* then the overt acts cause no problem. The substantive crime being complete in New York, N. Y., no overt act after the completion can be used to give jurisdiction to the court in the Northern District of Georgia. Put another way, if a person conspires to import and does import both the substantive and conspiracy crimes are complete at the port-of-entry and any overt acts alleged or proved after the completion of the offenses are surplusage. Nor can a theory of conspiring to conceal the conspiracy be used to give another court jurisdiction. This proposition was rejected in *Grunewald* v. *U.S.*, 353 U.S. 391.

Therefore if venue is to depend on the conspiracy charge it must be shown by the situs of the agreement.

The problem is that there is no evidence of any agreement and there is no evidence of defendant's ever having committed any of the overt acts. He was indicted with a person or persons unknown. No telephone conversations or letters at the situs were ever produced; in fact the only evidence of his participation were statements allegedly made about expecting "hash" from Holland. The agreement, if agreement there was, could have just as well been in New York or Amsterdam. He could just as logically have sent the package himself from Amsterdam.

Even if it were proved that the defendant committed the overt acts this would not prove the agreement.

"The agreement in a conspiracy cannot also be an overt act, *U.S. v. Sarno,* 456 F.2 875 at 877. It is not a question of where the agreement was made, it is a question of whether there is any evidence to show the existence of an agreement at all.

It must follow that since no evidence of an agreement was shown to have taken place in the Northern District, then *Keck* is applicable and venue is in New York, N. Y.

The Search and Seizure. Appellant will argue the search and seizure in the order of the questions presented.

2. The search warrant and affidavit (App. D) set out two premises to be searched. The first, a described box, and the second, a described suite of offices. While there are many cases dealing with general warrants no case has been found where this fact situation exists. Both the affidavit and the warrant itself particu-

larly describe a premise (the box), particularly describe the contraband in the box (marijuana), and then state that the warrant shall be executed at 2311 Bank of Georgia Building, Atlanta, Georgia 30303. No contraband is described as being on the premises of 2311 Bank of Georgia Building in direct violation of Rule 41 Fed. Rules Crim. Proc.

3 and 4. It is uncontradicted that two agents entered the offices in question without announcing their presence and without a search or arrest warrant. It is also uncontradicted that a package addressed to Petitioner's secretary was delivered some fifteen minutes later and after another fifteen minutes transferred to petitioner's sub-leased office, being placed upon his desk. It is also uncontradicted that the office and desk were not visible to the two waiting agents.

The first point is whether any warrant was necessary to enter and search the premises or to search the package. As to mail it is privileged *Olmstead* v. *U.S.*, 277 U.S. 438. Not only is a person's office protected but also his desk. *Mancusi* v. *DeForte*, 390 U.S. 364. Therefore, at least one or both of the premises, i.e., the whole suite or appellant's sub-leased office is protected. If the warrant to be executed at 2311 Bank of Georgia Building was valid and allowed the officers to search, then under 18 U.S.C. 3109 they *had* to announce their presence. *Sabbath* v. *U.S.*, 391 U.S. 585. If somehow or other the officers presence in the anteroom (though a part of 2311 Bank of Georgia) was permissible without a warrant and without announcement then it must inexorably follow that Petitioner's separate office required a separate warrant for it to be searched. *Mancusi* v. *DeForte*, 390 U.S. 364. Of course probable cause to search, standing alone, gives

no right to search since in that case no warrant would ever be necessary. *Coolidge* v. *New Hampshire,* 403 U.S. 443.

5. Are there any standards of any nature regarding the searching of packages coming into the United States from abroad?

Since the founding of the Republic, Federal Customs Officers have been authorized to search without probable cause, persons seeking entrance into the United States from a foreign country. 1 Stat. 21, 43, Act of July 31st, 1789. In recent years, however, federal authorities have expanded their pursuit of potential customs violators by conducting and increasing number of such searches at locations far removed from the international boundary. Very little case law existed as to the search by customs agents of incoming mail from overseas prior to 1955. However, since then, *United States* v. *Doe,* 472 F.2d 982, *U.S.* v. *Galvez,* 465 F.2d 681, *U.S.* v. *Beckley,* 335 F.2d 86, and *U.S.* v. *Feldman,* 366 F. Supp. 356, have come to the fore. In *Feldman,* a collection of these cases is set out. Since the first border search statute was enacted in 1789, customs officials have been authorized to stop, search and examine any vehicle or person where they shall *suspect* that there is merchandise which is subject to duty or merchandise which has been introduced into the United States in any manner contrary to law. 19 U.S.C. Sect. 482, see Act of July 31st, 1789, ch. 5, sec. 24, 1 Stat. 29, 43; Act of March 13th, 1815, ch. 94, sec. 2, 3 Stat. 231, Act of July 18th, 1869, ch. 201, sect. 3, 14 Stat. 178.

While these words were mentioned in all of the cases above cited, i.e., reasonably suspect, the concept

vanished in *United States* v. *Odland,* 502 F.2d 148. In *Odland,* the court cites *U.S.* v. *McDaniel,* 460 F.2d 129, 132, for the proposition that any person or thing coming into the United States is subject to search by that fact alone, whether or not there by any suspicion of illegality directed to the particular person or thing to be searched. While the gist of this opinion, that anyone for any reason may be searched coming across the border is debatable, nevertheless, *Odland* set down the proposition that the government is free to spot check incoming international mail at the port-of-entry, or to inspect all such mail, or to inspect any such mail which attracts the inspector's attention. This is being done.

In the case at bar, evidence shows that *all* mail coming into the United States from some 20 countries is being opened and searched. If the court upholds this border search it must, in essence, say that no standards whatsoever exist in border searches. The government witness does not even contend or imply that any standards of any sort are in use. He flatly states, that all packages coming in from some 20 designated countries are opened. We have come full circle. It is an almost unbearable irony, that the Fourth Amendment to the Constitution was primarily placed within that constitution because of the hatred of the early American Colonists for the searches of British *Custom* officials with their notorious writs of assistance and now, our own customs officials may search anything coming into the United States without reason.

For all of the above reasons Henritze would respectfully ask that the order denying the motion to suppress be reversed and that the case be reversed for further proceedings pursuant to that order.

Insufficiency of the Evidence.

6. In order to convict any defendant under the smuggling and the general conspiracy statutes, the government must prove knowledge, agreement and intent. Three witnesses testified that some thirty days before delivery, Petitioner told them he was expecting a shipment of hash from Holland. He did not say it was coming to him personally or to his office or anything else.

There must be an agreement, *Luteran* v. *U.S.*, 93 F.2d 395 at 399, to uphold a conspiracy count. The record is simply nonexistent as to any agreement. The overt acts mentioned in this indictment (the mailing, etc.) cannot be used as the basis of an agreement. *U.S.* v. *Sarno,* 456 F.2d 875 at 877.

Proof of the corpus delicti is not proof of any defendant's guilt. While it is necessary to prove the corpus delicti, i.e., smuggling and conspiracy, it is essential to prove the defendant's participation in the chain of events. That a package containing contraband was mailed in Holland and delivered to the addressee (Appellant's secretary) in Atlanta proves the corpus delicti of the substantive crime not Henritze's participation nor can it be used as a basis of the agreement in a conspiracy charge, *Luteran* v. *U.S.*, 93 F. 2d 395.

There was no proof that the defendant committed any of the overt acts alleged in the indictment which is absolutely essential for conviction. *U.S.* v. *Sarno,* 456 F.2d 875 at 877.

The government must also prove intent as to the substantive crime. The statements allegedly made by

the defendant may show knowledge or intent, they cannot show both.

The evidence is all circumstantial. In a circumstantial evidence case one inference cannot be founded upon another to sustain a conviction. *Byrth* v. *U.S.*, 327 F.2d 917. From Petitioner's statements, one may infer knowledge or intent but the jury cannot infer one and then bootstrap the second inference upon the other.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

WILLIAM R. GIGNILLIAT, III
Attorney for Petitioner

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BLEED THROUGH

APPENDIX A

Opinion of the Court of Appeals

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1963

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

WALTER M. HENRITZE, JR., *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(October 21, 1975)

Before BELL, THORNBERRY and MORGAN, *Circuit Judges.*

Per Curiam:

Walter M. Henritze appeals from his conviction under 18 U.S.C. § 371 and 21 U.S.C. §§ 812, 952(a) for conspiracy to import hashish and importation of hashish. Alleging several points of error, appellant argues (1) that venue was improper in the Northern District of Georgia, (2) that conviction on both the substantive and conspiracy counts constitutes double jeopardy, (3) that the three searches conducted by the government violated the Fourth Amendment and should have been suppressed, (4) that inflammatory remarks delivered by the prosecutor in his closing argument deprived appellant of a fair trial, and (5) that the evidence was insufficient to support a verdict of guilty.

After lengthy consideration of the briefs, record, and oral argument in this case, this court is of the opinion that the numerous points of error raised are without merit and that appellant's conviction should be affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1963

D.C. Docket No. CR 74-470-A

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

WALTER M. HENRITZE, JR., *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Georgia

Before BELL, THORNBERRY and MORGAN, *Circuit Judges.*

Judgment

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 21, 1975

Issued as Mandate:

APPENDIX B

Denial of Motion for Rehearing

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 28, 1975

TO ALL COUNSEL OF RECORD

No. 75-1963—U.S.A. vs. Wlater M. Henritze, Jr.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by SUSAN M. GRAVOIS
Deputy Clerk

/smg

cc: Mr. William R. Gignilliat, III
Mr. Steven W. Ludwick

BLEED

APPENDIX C

Stay of Mandate

APPENDIX C

[Filed: December 8, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1963

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

WALTER M. HENRITZE, JR., *Defendant-Appellant.*

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States. IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed to and including December 28, 1975, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ R. MORGAN
R. Morgan
United States Circuit Judge

APPENDIX D

Search Warrant

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Magistrate's Docket No. M 74

Case No. 1230 A

SEARCH WARRANT

United States of America

vs.

One brown wrapped cardboard box having approximate dimensions of 12″ x 9½″ x 5″, having a gross weight of 2 lbs. 3 ozs. addressed to June Llewelyn, 2311 Bank of Georgia Building, Atlanta, Georgia, U.S.A., 30303, bearing return address of S. T. Van Heusn, 36 Louis Davidstraat, Zandvoort, Netherlands

---

To James Williams, Special Agent, Drug Enforcement Administration, and/or any other Special Agents of the Drug Enforcement Adm. Affidavit having been made before me by Special Agent James Williams, Drug Enforcement Administration that he is positive [1] that on the premises know as one brown wrapped cardboard box having approximate dimensions of 12″ x 9½″ x 5″, having a gross weight of 2 lbs. 3 ozs. addressed to June Llewelyn, 2311 Bank of Georgia Building, Atlanta, Georgia, U.S.A. 30303, bearing return address S. T. Van Heusn, 36 Louis Davidstraat, Zandvoort, Netherlands, bearing a customs declaration describing the contents of the box as "1 box of Dutch chocolates," which arrived in Atlanta, Georgia

from New York, N.Y. on August 19, 1974, and is scheduled to be delivered to the addressee on September 13, 1974 in the Northern District of Georgia there is now being concealed certain property, namely approximately 15 ozs. of hashish, a Schedule 1 controlled substance as defined in 21 U.S.C. 812 and a contraband item.

which are hashish, a Schedule 1 controlled substance as defined in 21 USC 812 and a contraband item.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the porperty specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law. This search warrant must be executed between the hours of 8 a.m. & 12 noon 9/13/74 at 2311 Bank of Ga. Bldg., Atlanta, Ga. 30303.

Dated this 12th day of September, 1974 at —— p.m.

ALLEN L. CHANCEY, JR., *U.S. Magistrate*

Appendix "B"

Appendix "B"

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF GEORGIA

Magistrate's Docket No. M 74

Case No. 1230 A

AFFIDAVIT FOR SEARCH WARRANT

United States of America

vs.

One brown wrapped cardboard box having approximate dimensions of 12" x 9½" x 5", having a gross weight of 2 lbs. 3 ozs., addressed to June Llewelyn, 2311 Bank of Georgia Bldg., Atlanta, Ga., U.S.A. 30303, bearing return address of S. T. Van Heusn, 36 Louis Davidstraat, Zandvoort, Netherlands.

BEFORE ALLEN L. CHANCEY, JR., Atlanta, Georgia

The undersigned being duly sworn deposes and says:

That he is positive[1] that on the premises known as one brown wrapped cardboard box having approximate dimensions of 12" x 9½" x 5", having a gross weight of 2 lbs. 3 ozs., addressed to June Llewelyn, 2311 Bank of Georgia Bldg., Atlanta, Ga., U.S.A. 30303, bearing return address of S. T. Van Heusn, 36 Louis Davidstraat, Zandvoort, Netherlands, bearing a customs declaration describing the contents of the box as "1 box of Dutch chocolates", which arrived in Atlanta, Ga., from New York, N.Y. on 8/19/74, and is scheduled to be delivered to the addressee on 9/13/74,

in the Northern District of Georgia

there is now being concealed property, namely approximately 15 ounces of hashish,

which are hashish, a Schedule I controlled substance as defined in 21 U.S.C. 812, and a contraband item.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: On 8/19/74, Postal Inspector Schnetzer received the above described box from New York, N.Y., with information which stated that the box contained approximately 15 ounces of hashish, a controlled substance. The contents of the box had been previously field tested and showed a positive reaction for hashish in New York. On 9/12/74, the above described box was opened in the office of U.S. Postal Inspector Schnetzer in the presence of SA Robert Alston, U.S. Customs, Postal Inspector Schnetzer, SA James Williams, DEA, SA George Faz, DEA, and SA Mike Dorsett, DEA. On 9/12/74, a field test for hashish was conducted on the contents of the above described box in the Office of Postal Inspector Schnetzer. The test results were positive for the presence of hashish in the contents of the box. After the test was concluded, the contents of the above described box were weighed, and the box was re-sealed by SA Williams and SA Alston. The above described box is scheduled for delivery to 2311 Bank of Georgia Bldg., Atlanta, Ga., on 9/13/74.

JAMES WILLIAMS
Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, September 12, 1974

Appendix "A"

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-913

WALTER M. HENRITZE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the venue of his prosecution was improper, (2) his motion to suppress should have been granted, and (3) there was insufficient evidence to sustain his convictions.

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of importation of hashish, in violation of 21 U.S.C. 952(a), and conspiring to import, distribute, and possess hashish, in violation of 18 U.S.C. 371.[1] He was sentenced to concurrent terms of two years' imprisonment and two years' special parole. The court of appeals affirmed (Pet. App. A) and denied a petition for rehearing *en banc* (Pet. App. B).

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[1]The court granted petitioner's motion for a directed verdict of acquittal on the charge of possession of hashish with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Tr. 199).

1. The evidence at trial established that on August 5, 1974, petitioner, an attorney in Atlanta, Georgia, told Ann Hester and Joyce Weldy, legal secretaries with whom he was acquainted, that he was expecting a shipment of a large quantity of "hash" from Amsterdam within the next week (Tr. 71-73, 83, 86-87). Two or three days later, petitioner also told another secretary, Teresa Moore, that he would be receiving a pound of "hash" from Amsterdam and asked that she let him know if any of her friends needed any of it (Tr. 95-96).

At about the same time, on August 8, 1974, Frank Cuccaro, a mail specialist with the United States Customs Service in New York City, opened a package from the Netherlands addressed to June Llewellyn in Atlanta, Georgia, pursuant to instructions to open all parcels (with limited exceptions) coming from certain countries. In the package, he discovered two slabs of hashish, weighing about a pound, sandwiched between layers of candy in a box of chocolates. After testing and recording the contents, Cuccaro rewrapped the package and mailed it to a postal inspector in Atlanta (Tr. 59-66, 69, 104).

On September 12, 1974, the package was reopened by federal authorities in Atlanta, and material from the slab again tested positively for hashish (Tr. 149). The same day a warrant was obtained from a federal magistrate, authorizing a search for the box of chocolates containing the hashish at the location to which the box was addressed, 2311 Bank of Georgia Building, Atlanta, Georgia. The search warrant stated that it must be executed between the hours of 8:00 a.m. and 12 noon on September 13, 1974, at that address (Pet. App. D).[2]

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[2]The affidavit stated that the "box is scheduled for controlled delivery to 2311 Bank of Georgia Bldg., Atlanta, Ga., on 9/13/74, at 9:45 a.m." Petitioner's appendix (Pet. App. D 8a) does not reflect the words "controlled" and "at 9:45 a.m.," which were added by hand to the typed affidavit by Agent James Wiliiams of the Drug Enforcement Administration and were initialled by him.

On September 13, 1974, within the fixed time limits, two undercover DEA agents entered the premises described in the warrant, which had previously been ascertained to be a law office where Llewellyn was employed. Under the pretext of wanting to see a lawyer, the agents waited in the reception area in order to observe the controlled delivery of the hashish (Tr. 127-128, 134-135, 154). The regular postal carrier soon delivered the package to Llewellyn, the receptionist, and left with a receipt (Tr. 117-118). Petitioner then came into the reception area from his office and took the package from Llewellyn (Tr. 121-122). He held it for a few minutes, put it on her desk, and returned to his office (Tr. 124). A short time later, after petitioner had left the office for court (Tr. 124), Llewellyn placed the package in petitioner's office (Tr. 125).[3] Agent Williams thereupon entered the inner office with the search warrant and seized the package (Tr. 127, 151).

2. Petitioner contends (Pet. 10) that venue was improper in the Northern District of Georgia because the crimes of conspiracy and importation were completed at the port of entry, New York City. Petitioner first rasied the claim of improper venue on appeal. Since this alleged defect was apparent on the face of the indictment, petitioner's failure to object either before or during trial waived any objection. *United States* v. *John*, 518 F. 2d 705, 708-709 (C.A. 7); *United States* v. *Jackson*, 482 F.2d 1167, 1179 (C.A. 10), certiorari denied, 414 U.S. 1159. See also *United States* v. *Dryden*, 423 F.2d 1175, 1178 (C.A. 5), certiorari denied, 398 U.S. 950.

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[3]Llewellyn testified that petitioner had told her in early 1974 that if a package came addressed to her, it would be meant for him and that she should receive it (Tr. 122-123). Subsequently, a package from overseas had arrived in her name and she had put it in petitioner's office (Tr. 123). Accordingly, Llewellyn believed the second package was meant for petitioner as well (Tr. 122).

In any event, the venue here was proper because the conspiracy to import hashish did not terminate when the package first entered the United States but continued until its delivery to petitioner in Georgia. See *United States* v. *Reynolds,* 511 F.2d 603, 607 (C.A. 5); *United States* v. *Guajardo,* 508 F.2d 1093, 1095 (C.A. 5), certiorari denied, October 6, 1975, No. 74-6489; *United States* v. *Lawson,* 507 F.2d 433, 445 (C.A. 7), certiorari denied, 420 U.S. 1004. Since the arrival of the package in Atlanta obviously was integral to petitioner's conspiracy to import it, venue lay in the Northern District of Georgia. *Hyde* v. *United States,* 225 U.S. 347, 367. Moreover, since the conspiracy included not only the importation but also the possession and distribution of the hashish, petitioner's solicitation of Teresa Moore in Atlanta also was an overt act that established venue.[4]

Even though it is unnecessary to reach the question in light of the concurrent sentences imposed on petitioner, see *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16, venue also was proper in the Northern District of Georgia for the substantive importation offense. Importation of a controlled substance is a continuing crime, which may be prosecuted at the place of ultimate delivery as well as at the port of entry. See 18 U.S.C. 3237(a); *United States* v. *Barnard,* 490 F.2d 907, 911 (C.A. 9), certiorari denied, 416 U.S. 959; *United States* v. *Jackson, supra,* 482 F. 2d at 1178.[5]

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[4]An overt act may be proven although it is not alleged in the indictment. *United States* v. *Downing,* 51 F.2d 1020, 1031 (C.C.A. 2).

[5]*Keck* v. *United States,* 172 U.S. 434, upon which petitioner relies, was decided prior to the enactment of Section 3237(a). Moreover, despite petitioner's citation of two district court cases, there is no conflict among the circuits as to whether importation of a controlled substance is a continuing offense. The Ninth Circuit in *United States* v. *Barnard, supra,* has disagreed with the

3. Nor is there merit to petitioner's several contentions (Pet. 12-15) that the hashish was illegally seized. First, the package from the Netherlands was properly opened in New York by customs officials acting without a warrant. As this Court recognized in *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125:

> Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "[t]o regulate Commerce with foreign Nations." Art. I, §8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

Accordingly, the government is free to inspect international mail entering this country without probable cause or other suspicion. *United States* v. *King*, 517 F.2d 350, 351-352 (C.A. 5); *United States* v. *Barclift*, 514 F.2d 1073, 1075 (C.A. 9), certiorari denied, October 6, 1975, No. 74-6431; *United States* v. *Odland*, 502 F.2d 148, 150-151 (C.A. 7) certiorari denied, 419 U.S. 1088. Cf. *United States* v. *Doe*, 472 F.2d 982 (C.A. 2), certiorari denied *sub nom. Rodriquez* v. *United States*, 411 U.S. 969.

Furthermore, the presence of the undercover agents in petitioner's outer office during the controlled delivery was not a search, since the reception area was open to the public. *Katz* v. *United States*, 389 U.S. 347, 351; *Lewis* v. *United States*, 385 U.S. 206, 210-211. Nor were the agents required to give notice of their authority and purpose pursuant to 18 U.S.C. 3109, for they made a normal

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dicta in *United States* v. *Feldman*, 366 F. Supp. 356 (D. Hawaii), and we are unaware of any decision in the Fourth Circuit that has adopted the reasoning in *United States* v. *Lember*, 319 F. Supp. 249 (E.D. Va.).

entrance into an office open for business, not a forcible entry into a house. Their entry into the inner office to which Llewellyn had delivered the package was proper to execute the search warant.

Finally, the warrant adequately described the premises to be searched. Although the premises were designated by reference to the box, the warrant also directed the officers to execute the search at the specific location, 2311 Bank of Georgia Building, to which the package was addressed. Viewed "in a commonsense and realistic fashion," *United States* v. *Ventresca,* 380 U.S. 102, 108, the warrant described with sufficient particularity the object and situs of the search.

4. Petitioner contends (Pet. 16) that the evidence was insufficient to support his convictions for importation and conspiracy. Viewing the evidence in the light most favorable to the government (*Hamling* v. *United States,* 418 U.S. 87, 124), there was substantial evidence to sustain the jury's verdicts. From petitioner's statements to Hester, Weldy, and Moore that he would be receiving a pound of hashish from Amsterdam within a week, the jury could legitimately infer that petitioner had entered into an agreement with one or more other persons for the drugs to be sent to him in Atlanta. The arrival a few days thereafter of the box from the Netherlands addressed to petitioner's office in Atlanta, in addition to Llewellyn's testimony about petitioner's use of her name to receive packages, also amply supported the jury's finding of illegal importation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.